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STATE OF MONTANA

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September 7, 2004

The Rt. Honourable Herb Gray, P.C., C.C., Q.C.
Chair, Canadian Section
International Joint Commission
234 Laurier Avenue W., 22nd Floor
Ottawa, ON K1P6K6

The Honourable Dennis L. Schornack
Chair, United States Section
International Joint Commission
1250 23rd Street N.W. Suite 100
Washington, DC 20037

Dear Honourable Herb Gray and Dennis Schornack:

I would like to thank Commissioners Herb Gray, Jack Blaney, Irene Brooks and Allen Olson and the IJC staffs for taking time out of their busy schedule to hold consultation meetings in Montana, Saskatchewan and Alberta on the apportionment of the Milk and St. Mary rivers and eastern tributaries of the Milk River. I hope you found the meetings as informative as Lt. Governor Ohs and the Milk River water users did in Montana.

During the meetings, it became very clear to my staff that Canada, and especially Alberta, enjoys a greater quantity and far more certainty in their water supplies from the St. Mary and Milk rivers than the Milk River water users in Montana. Canada did so well in the original negotiations that it is understandable why Canadians are not interested in having the Order reviewed. Charles A. Magrath of Lethbridge, Alberta, a Canadian Commissioner on the IJC from 1911 to 1936, did a splendid job representing and protecting the interests of southern Alberta. It is unfortunate that back then, Montana and the United States had no local champion on the Commission.

By 1930, it was already obvious to the United States that the 1921 Order did not apportion water in the way intended by the Treaty, but the Canadian IJC members were reluctant to review the Order arguing that not enough time had

Honourable Herb Gray and Dennis Schornack

September 7, 2004

Page 2

elapsed. But now, 83 years has elapsed and we have much more data on flows and how the water is actually begin divided. We believe sufficient time has passed to warrant a review of the Order by the Commission.

A major discussion item at the recent consultation meetings was the issue of "certainty" of water. The 1921 Order gave Canada this certainty 83 years ago, but the United States has never had this certainty—we have never had a dependable water supply. How many more years must waters users in the Milk River basin of Montana suffer before being treated equally as stated in Article VI of the Boundary Waters Treaty?

We believe there are a number of reasons for this uncertainty. First, in dry years the United States is entitled to considerably less water than Canada under the existing Order and administrative procedures. Figure 1 illustrates this point. Please note that the United States entitlement becomes progressively less the drier it becomes. The primary reason for this discrepancy is the fact that the entitlements are based on two rivers with significantly different hydrologic settings. The Milk River is a prairie stream with inconsistent flows and a river that frequently goes dry during the summer. Whereas, the St. Mary River originates in the mountainous region of northwestern Montana and produces consistent and considerably larger flows throughout the year. Figure 2 illustrates this large discrepancy.

Figure 1. Comparison of the combined Milk-St. Mary river flows that have been apportioned to the United States and Canada.

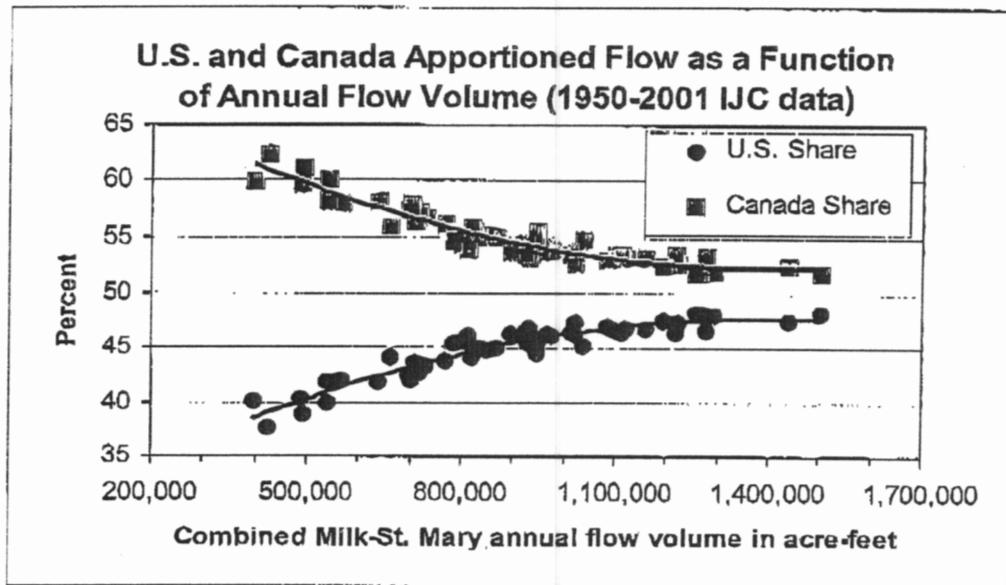
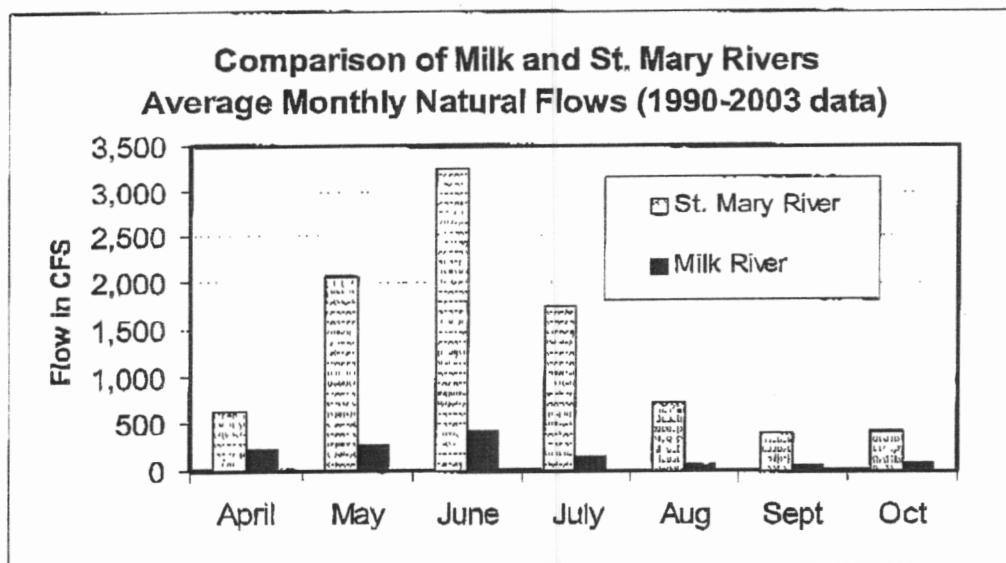


Figure 2. Comparison of the computed average monthly flows of the St. Mary and Milk rivers (1990-2003 data; all flows are in cubic feet per second).

Honourable Herb Gray and Dennis Schornack

September 7, 2004

Page 3



The timing of spring runoff is also different in the two basins and should be addressed differently in the Order. However, the existing order treats them the same. In the Milk River basin, the spring runoff can occur as early as March when flows are shared equally between Canada and the United States. In the St. Mary River, spring runoff occurs in June when Canada is entitled to the first 500 cfs or $\frac{3}{4}$ of the natural flow.

It was suggested in the consultation meetings that the Milk River irrigators in Montana are inefficient in the use of water. We disagree with that suggestion and believe they are very efficient in doing what they can do with the amount of water available to them. It is difficult to spend a lot of money on improvements when your water supply is short in six out of every ten years and you have a difficult time just making a living.

Another contributing factor to our water shortage problem is that the United States receives less than its entitlement under the existing Order. There are two primary reasons for this. First, the United States is unable to fully utilize its "surplus" flows on the St. Mary River under the current administrative procedures. Ironically, the current administrative procedures do allow Canada the ability to utilize their surplus flows to offset deficits incurred early in the season on the eastern tributaries of the Milk River (Battle Creek, Lodge Creek and Frenchmen River). We believe there should be consistency here; the existing procedures should provide the same opportunity to the United States on the St. Mary River.

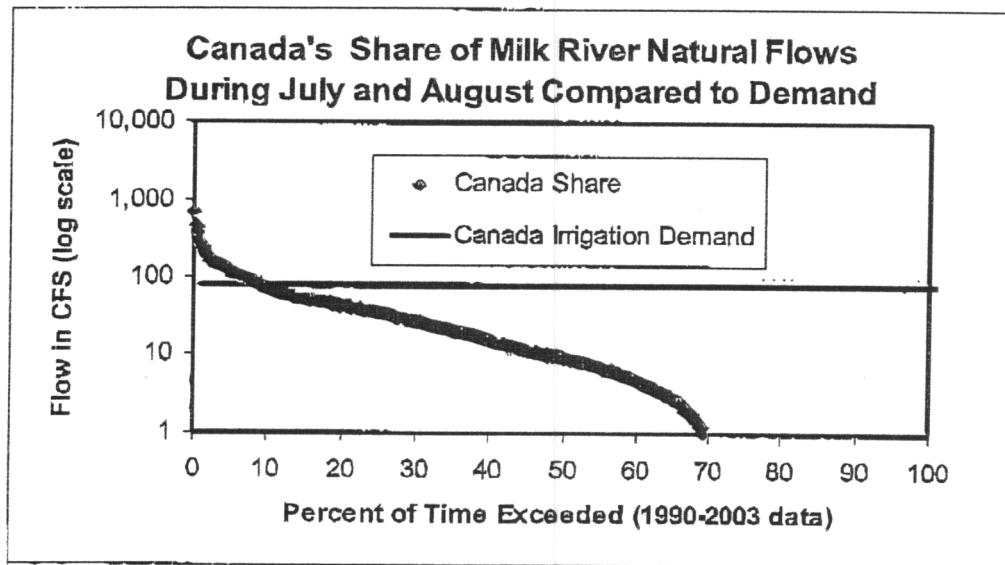
Second, the Milk River irrigators in Alberta are taking and using St. Mary River water from the Milk River channel that belongs to the United States--far more

Honourable Herb Gray and Dennis Schornack
September 7, 2004
Page 4

water than that provided for in the Letter of Reference signed by the IJC in 2001. We are considering rescinding the 2001 letter as it gives Alberta the right to divert St. Mary water thorough the St. Mary canal for use by its Milk River water users in Alberta, but gives the United States water that it is already entitled to under the existing 1921 Order, but is precluded from taking by the existing administrative procedures. Presently, Alberta is diverting this water free without paying operation and maintenance costs to the United States.

In Figure 3, Canada's share of the computed Milk River natural flow for July and August during the 1990-2003 period is compared to an estimated irrigation demand of 75 cubic feet per second—the amount of water necessary to irrigate approximately 7,000 acres of land along the Milk River in Alberta. Apportioned flows in excess of this 75 cfs demand are only available to Canada about 10 percent of the time. During about 30 percent of the time in July and August there would be no flow in the Milk River if it were not for the St. Mary River water that is diverted by the United States into the Milk River channel.

Figure 3. A comparison of Milk River July and August computed natural flows in cubic feet per second to Canadian Milk River irrigation demands.



Montana strongly recommends that a reference be created by the IJC to review the 1921 Order and its administrative procedures for apportioning the flows of the Milk and St. Mary Rivers and their tributaries. The review should be based on an assessment of the flow data and apportionment records since 1921. The review should also consider all the provisions in the first two sentences of Article VI dealing with the apportionment, not just the second sentence. The two rivers should be treated as one stream; the water should be apportioned equally

Honourable Herb Gray and Dennis Schornack
September 7, 2004
Page 5

between the two countries; and in making such equal apportionment more than half of the water should be taken from one river and less than half from the other river by either country so as to afford a more beneficial use to each.

To conduct the review, we would urge the IJC to consider forming a bi-national study board consisting of both private citizens and representatives of government agencies. United States representation on this board should include technical officials and leaders from U.S. Geological Survey, Blackfeet and Fort Belknap Tribes, U.S. Bureau of Reclamation, Montana Department of Natural Resources and Conservation, Milk River Joint Board of Control, Milk River Irrigation Districts in Montana, U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service and the recreation sector.

As an alternative, the IJC may wish to consider the structure that it used to create the Letter of Reference on the Cabin Creek coal mine in the Flathead River of British Columbia and Montana. Montana felt the design and structure of that reference worked very well.

We believe the terms of reference should include the following tasks:

1. An evaluation of the existing Order in light of the past 80 years of hydrologic records and apportionment information.
2. A determination on how to better address the language in both apportionment sentences of Article VI in light of an evaluation of the historic record (Task 1).
3. An assessment on changes needed to the existing administrative procedures to better ensure that the assumptions and data used are accurate. For example from our recent assessments, we conclude that the acres irrigated in the U.S. portion of the North Fork of the Milk River are over estimated, the acres irrigated in the Alberta portion of the basin are under estimated, and the amount of evaporation from the Milk River channel that is charged against the United States is too high.
4. An assessment to determine the best way for both countries to fully utilize their entitlements including the use of surplus flows.
5. An assessment to address the water rights of Native Americans and First Nations into the Order and administrative procedures.
6. An assessment of the needs of endangered species, critical habitat, recreation and water quality.
7. An assessment on how to better address the differences in the natural hydrology of the Milk and St Mary rivers in light of recent and projected climatic change in these river basins.
8. A determination of the amount of St. Mary River water that is used in the Milk River channel by Alberta.

Honourable Herb Gray and Dennis Schornack

September 7, 2004

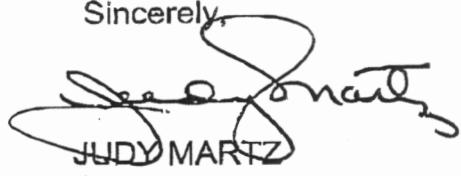
Page 6

9. An assessment to incorporate the international tributaries of Lee and Rolph creeks and others of the Milk and St. Mary River into the apportionment procedures.
10. An assessment on how to resolve the conflicts between the two sentences of Article VI dealing with the apportionment during low flows. That is, how to divide the waters equally between Canada and the United States, but still provide a prior right to each country from a different river.
11. Build a hydrologic daily water accounting model of both river systems in Canada and the United States that can be used to address the above issues and to evaluate ways for improving basin wide water management and to allow us to move toward a more accurate daily apportionment of flow.

In summary, I appeal to the Commission's sense of fairness and ask you to create a reference to review the Order. We hope the Commission will consider the actual language of both sentences in Article VI of the Boundary Waters Treaty in its review.

Again, I thank you for holding the hearings in late July and anxiously wait your decision on this issue that is so important to Montana. Thank you.

Sincerely,



JUDY MARTZ
Governor

c: Senator Conrad Burns
Senator Max Baucus
Representative Dennis Rehberg
Maryanne Bach, High Plains Regional Director, USBR
Bob Davis, MT State Director, USGS